(1) Supreme Court, U.S.
FILED
991435 FEB 28 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

EDWIN THOMAS GRAVES, #16552,

Petitioner,

v.

BOBBY BOONE, Warden,
Mack Alford Correctional Center,

and

DREW EDMONDSON, Attorney General
of the State of Oklahoma,

Respondents.

On Petition For Writ Of Certiorari
To The Tenth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the *habeas corpus* limitations period of the Anti-Terrorism and Effective Death Penalty Act [the "AEDPA"] can expire while a state court judgment is still subject to *certiorari* review by the Supreme Court of the United States? Stated differently, whether a state court proceeding is pending until it is final?

   This question is relevant to this case because:

   A. The District Court and the Court of Appeals deemed Mr. Graves' *habeas* petition untimely even though the AEDPA limitations period calculated by the United States District Court had expired *after* the opinion of the Oklahoma Court of Criminal Appeals was issued on post-conviction, and *before* the time within which Mr. Graves could have sought *certiorari* review in this Court.

2. When does the limitations period of the AEDPA begin to run for federal constitutional errors arising during state court post-conviction proceedings?

   This question is relevant to this case because:

   A. On *habeas*, Mr. Graves asserted that the post-conviction procedures of the Oklahoma trial and appellate courts violated his federal constitutional due process rights in at least two respects:

      i. Oklahoma's procedural bar against raising *Strickland* claims concerning trial counsel on post-conviction is a violation of fundamental 14th Amendment due process, and is neither independent, nor adequate.

      ii. Oklahoma's *de jure* and *de facto* denial of evidentiary hearings on *Strickland* issues concerning both trial and appellate counsel

QUESTIONS PRESENTED – Continued

is a violation of fundamental 14th Amendment due process, and is neither independent, nor adequate.

B. Mr. Graves presented these fundamental due process claims to the United States District Court within 30 days from the date the Court of Criminal Appeals issued its opinion denying these fundamental due process rights, only to have his entire *habeas* petition dismissed as untimely under the AEDPA.

3. Whether federal *habeas* jurisdiction for petitioners in state custody can ever extend to due process violations arising from state court's application of a procedural bar to *Strickland* claims concerning trial counsel's ineffectiveness, and/or the summary denial of evidentiary hearings concerning *Strickland* claims?

This question is relevant to this case because:

A. The District Court based its ruling entirely on the AEDPA limitations provisions. Mr. Graves' appeal to the Tenth Circuit specifically asserted the grounds set out in Question 2, *supra*. However, the Court of Appeals made no ruling concerning the beginning of the limitations period, but instead ruled that due process violations in state court post-conviction proceedings are not cognizable in a federal *habeas corpus* action.

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OPINIONS BELOW

1. The unpublished opinion of the Court of Appeals for the Tenth Circuit is set out verbatim at Appendix pages 1-5. The Circuit Court's opinion is also available online at:
http://www.kscourts.org/ca10/cases/1999/11/99-7013.htm

2. The unpublished opinion of the United States District Court for the Eastern District of Oklahoma is set out verbatim at Appendix pages 9-12. The District Court's minute order denying Mr. Graves' motion for a new trial is set out verbatim at Appendix page 8. The District Court's minute order denying Mr. Graves' request for a certificate of appealability is set out verbatim at Appendix pages 6-7.

3. The unpublished opinion of the Oklahoma Court of Criminal Appeals affirming the Oklahoma County District Court's denial of post-conviction relief is set out verbatim at Appendix pages 13-18.

4. The unpublished opinion of the Oklahoma County District Court's denying Mr. Graves' application for post-conviction relief is set out verbatim at Appendix pages 19-23.

5. The unpublished opinion of the Oklahoma Court of Criminal Appeals affirming Mr. Graves' conviction on direct appeal is set out verbatim at Appendix pages 24-31.

6. The unpublished judgment and sentence of the trial court is set out verbatim at Appendix pages 32-34.

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Tenth Circuit denying the writ of habeas corpus was

issued on November 30, 1999. [No petition for rehearing was filed.] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1), petitioner having asserted below and herein a deprivation of his rights under the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. This case involves the Fifth Amendment to the United States Constitution, which provides in relevant part:

   > No person shall be . . . deprived of life, liberty, or property, without due process of law[.]

2. This case also involves the Sixth Amendment to the United States Constitution, which provides in relevant part:

   > In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

3. This case also involves the Fourteenth Amendment to the United States Constitution which applies the Sixth Amendment to the states and which provides, in pertinent part:

   > No . . . State [may] deprive any person of life, [or] liberty . . . without due process of law.

4. This case also involves the limitations provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub.L. No. 104-32, 110 Stat. 1214. In pertinent part, the AEDPA, 28 U.S.C. § 2244(d)(1) provides that:

   > § 2244(d)
   >
   > (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a

person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

5. This case also involves 28 U.S.C. § 2254 which provides in relevant part:

§ 2254

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an

application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the

law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Court of Appeals' interpretation of the AEDPA undermines the jurisdiction of this Court, conflicts with the AEDPA's plain language, and abridges the fundamental right to petition for a *writ of habeas corpus*.

The *Writ of Habeas Corpus* represents the essence of America's commitment to government under law, and the Constitution forbids its peacetime suspension. U.S. CONST. ART. I, SECTION 9, CL. 2. This constitutionally protected right to petition for judicial inquiry into unconstitutional and illegal confinement is the last, best, and sometimes only hope of prisoners for whom the regular appellate process has proven fruitless. At the time of his conviction in 1987, Mr. Graves had a vested right to ultimately bring his constitutional claims to the federal courts. U.S. CONST. ART. I, § 9, CL. 2. *Vasquez v. Hillary*, 474 U.S. 254, 264-65, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) [Conviction set aside 23 years later]. The AEDPA cannot be construed or applied in a fashion that subverts this vested, fundamental, and historical right. *Texaco, Inc. v. Short*, 454 U.S. 516, 527 n.21, 102 S.Ct. 781, 791 n.21, 70 L.Ed.2d 738 (1982).

The tolling provisions of the AEDPA provide that the time during which a state court post-conviction proceeding is "pending" is excluded from the calculation of the limitations deadline. 28 U.S.C. § 2244(d)(2). This case, and no doubt many others, turns on the interpretation of this single word: Is a post-conviction action "pending" in a state court until the date the state court's decision is filed of record, or is it "pending" until the time within which it is subject to *certiorari* review in this Court has expired, *e.g.*, until it is a final judgment?

In its decision below, the Court of Appeals ruled that the post-conviction "tolling period" ends at the moment the state's highest court files its decision. Although this Court has not yet addressed this specific issue, logic, the fundamental nature of the right of *habeas corpus*, and basic statutory interpretation dictate that the Court of Appeals' judgment is mistaken, and that a state court post-conviction proceeding must be deemed to remain pending until it is no longer subject to *certiorari* review by this Court.[1]

The Court of Appeals recognizes that the term "pending" means "until it becomes final" when the interpretation is made within the context of discretionary review by the state courts.

> . . . The crux of this appeal is whether the limitations period was tolled until the state court denied the second habeas application, as the district court found, or whether it remained

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[1] Upon information and belief, a petition for *certiorari* including a question substantially similar to this is pending in *Rhine v. Boone*, No. 99-6598, petition filed October 4, 1999.

> tolled until the state supreme court denied certiorari, as Barnett asserts.
>
> *Barnett v. Lemaster*, 167 F.3d 1321 (CA10 1999)

While there is a distinction between *certiorari* review by state courts, and *certiorari* review by the Supreme Court of the United States, the *Barnett* Court determined that the term "pending" necessarily includes the time when a suit is subject to appeal.

> . . . We conclude the term [pending] must be construed more broadly to encompass all of the time during which a state prisoner is attempting, through proper use of state court procedures, to exhaust state court remedies with regard to a particular post-conviction application. **Such a construction comports with the generally-accepted definition of the term**. See, e.g., Beverly Community Hosp. Assoc. v. Belshe, 132 F.3d 1259, 1264-65 (9th Cir. 1997) (**statutory reference to "pending" lawsuits encompasses not only undecided cases at district court level but also cases pending on appeal**), cert. denied, 119 S.Ct. 334 (1998); de Rodulfa v. United States, 461 F.2d 1240, 1253 (D.C. Cir. 1972) ("**suit is pending until the appeal is disposed of, and until disposition any judgment appealed from it is still sub judice**").
>
> [*Barnett, id.*]
> [bracketed material and **emphasis** added]

There is no logical or rational basis for defining the term in one way when referring to *certiorari* review by a state court and *certiorari* review by this Court. It is also clear that the view adopted by the Court of Appeals in Mr. Graves' case would result in an illogical construction

that would have the AEDPA limitations period continue to run even while this Court was considering a prisoner's *certiorari* petition. For example, if a state court prisoner submitted a petition for *certiorari* to this Court [whether following direct appeal or a post-conviction action], that petition might be pending in this Court for more than the year contemplated by the AEDPA. If such time was not tolled, one can imagine a situation in which a petitioner was granted *certiorari* by the Supreme Court, and his case remanded to the Court of Criminal Appeals for further proceedings, only to later find that his right to *habeas corpus* review had expired while the Supreme Court had been considering his case. In another case, this Court might simply deny *certiorari*, but if that order declining discretionary review was issued after the first anniversary of the state court decision for which review was sought, the fundamental right to seek a *writ of habeas corpus* would have simply vanished from the legal landscape without the prisoner *ever* having had a chance to exercise it.

This Court must resolve this issue in a way that is consistent with the fundamental nature of the right of *habeas corpus*. Mr. Graves' collateral attack through post-conviction must be deemed "pending" until the judgment of the state court is no longer subject to reversal or review, and the 90 day window of opportunity for *certiorari* review allowed by Supreme Court Rule 13 has expired.

2. The Court of Appeals' refusal to address fundamental due process claims which arose for the first time during post-conviction proceedings, conflicts with the AEPDA's plain language, abridges the fundamental right to petition for a *writ of habeas corpus*, and frees the Oklahoma Court of Criminal Appeals from the superintending jurisdiction of this Court.

The District Court committed plain error when it refused to address the merits of Mr. Graves' claims that he was denied due process of law on post-conviction by: 1) the refusal of the state courts to permit *Strickland* claims concerning trial counsel to be raised on post-conviction; and, 2) the refusal of the state courts to permit the presentation of evidence in support of his constitutional claims. The Court of Appeals has consistently identified these constitutional deficiencies as matters within federal *habeas* jurisdiction. In *Miller v. Champion*, the Court of Appeals addressed both issues within the context of *Strickland* claims:

> . . . However, notwithstanding Oklahoma state law to the contrary, we have held that a state prisoner may raise an ineffective assistance of counsel claim for the first time in a § 2254 proceeding unless (1) he had an opportunity to consult with separate counsel on direct appeal in order to obtain an effective assessment of trial counsel's performance and (2) the State provided a procedural mechanism that afforded him an opportunity to develop adequately the factual basis of his ineffective assistance claim

> on direct appeal. *See English v. Cody*, 146 F.3d 1257, 1263 (10th Cir. 1998).
>
> *Miller v. Champion*, 161 F.3d 1249 (CA10 1998)

The same constitutional criticism of Oklahoma's procedural rule limiting claims of trial counsel's ineffectiveness to direct appeal and barring consideration on post-conviction was addressed in *Brecheen v. Reynolds*:

> The practical effect of this ruling [by the Oklahoma court] is to force [the petitioner] either to raise this claim on direct appeal, with new counsel but without the benefit of additional fact-finding, or have the claim forfeited under state law. This Hobson's choice cannot constitute an adequate state ground under the controlling case law because it deprives [the petitioner] of any meaningful review of his ineffective assistance claim.
>
> *Brecheen v. Reynolds*, 41 F.3d 1343, 1363-64 (CA10 1994), cert. denied, 115 S.Ct. 2564 (1995)

See also, *Brewer v. Reynolds*, 51 F.3d 1519 (10th Cir. 1995) and *Beaulieu v. United States*, 930 F.2d 805, 807 (CA10 1991).

These specific federal constitutional claims were necessarily presented to the state courts for the first time on post-conviction, and the federal constitutional injuries suffered by Mr. Graves did not come into being until the Oklahoma Court of Criminal Appeals rejected them in its August 7, 1997, ORDER AFFIRMING THE DENIAL OF POST CONVICTION RELIEF. See Appendix page 14.

Mr. Graves then presented these claims in his § 2254 *writ*, which was filed in the United States District Court just one month later. It is axiomatic that one month is less

than one year, and it was therefore the plainest of plain error for the District Court to rule these claims time barred under the AEDPA. It is as if the District Court ruled that the "date of injury" of all constitutional errors within post-conviction proceedings "relate back" to the date of the final judgment on direct appeal. If this interpretation is permitted to stand, the Oklahoma Courts will have effectively escaped all future *habeas corpus* review of *any* action taken on post-conviction by *any* Oklahoma Court with respect to *any* prisoner who has been "out of court" for more than the AEDPA's one year limitations period.

This plain error was then compounded when the Court of Appeals omitted any reference to the District Court's error while nevertheless affirming the dismissal of Mr. Graves' *writ* on the grounds that, "Mr. Graves challenges to Oklahoma's post-conviction procedures do not amount to federal constitutional claims in a federal habeas action. See *Steele v. Young*, 11 F.3d 1518, 1524 (10th Cir. 1993)." See Appendix page 5. Not only was this broad ruling *de hores* the District Court's opinion, it unreasonably denies *habeas* jurisdiction to legitimate federal constitutional claims.

The requirement of exhaustion of state remedies offers state courts the opportunity to conform their decisions to the supreme law of the land, and 28 U.S.C. § 2254 expressly confers jurisdiction on this Court to reexamine and, if necessary, set aside state court orders and judgments whenever they are shown to have:

1. resulted in a decision that was contrary to, or involved an unreasonable application of,

> clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> 2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
>
> 28 U.S.C. § 2254(d)

In addition to the fundamental rights identified in *Miller v. Champion* and *Bresheen v. Reynolds*, 14th Amendment due process and equal protection of the law impose on the States a federal constitutional duty to provide due process of law with respect to rights existing or created under state law. While there may be no independent federal constitutional requirement that a particular state conduct its post-conviction affairs in a particular way, Oklahoma's post-conviction proceedings are created by such statutes, 22 O.S. §§ 1080, *et seq.*, and these statutory rights create due process liberty interests within the scope of 14th Amendment due process of law. *Hicks v. Oklahoma*, 447 U.S. 323 (1980).

It is essential that this Court assume *certiorari* jurisdiction and reverse the judgment of the Court of Appeals. If this Court allows the District Court's judgment that constitutional errors occurring for the first time during post-conviction proceedings are time barred whenever the direct appeal judgment is time barred under the AEDPA, then the Oklahoma Courts will have effectively escaped *habeas corpus* review of *any* action taken on post-conviction by *any* Oklahoma Court with respect to *any* prisoner who has been "out of court" for more than the

AEDPA's one year limitations period. Even more troubling, if the decision of the Court of Appeals is allowed to stand, the Oklahoma Courts will have effectively escaped *habeas corpus* review of *any* action taken on post-conviction by *any* Oklahoma Court with respect to *any* prisoner, *whether or not* the prisoner has been "out of court" for more than the AEDPA's one year limitations period. Freed of oversight, the Court of Criminal Appeals could openly and directly contradict this Court's interpretation of federal constitutional law in a post-conviction proceeding, and the victimized prisoner could never reach the merits on *habeas*. The 14th Amendment demands more of federal oversight.

CONCLUSION

For the foregoing reasons, the Court should grant *certiorari* review in this case and upon full consideration, remand this case to the Court of Appeals for the Tenth Circuit with instructions to reinstate Mr. Graves' petition for the Great *Writ*.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

EDWIN THOMAS GRAVES, Petitioner-Appellant, v. BOBBY BOONE, Warden, Mack Alford Correctional Center; THE ATTORNEY GENERAL OF THE STATE OF OKLAHOMA, Respondents-Appellees.	No. 99-7013 (D.C. No. CV-97-512-S) (E.D. Okla.)

ORDER AND JUDGMENT*

(Filed Nov. 30, 1999)

Before **ANDERSON, BARRETT,** and **BRISCOE,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G).

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments, nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

The case is therefore ordered submitted without oral argument.

Petitioner-appellant Edwin Thomas Graves appeals the district court's denial of his 28 U.S.C. § 2254 petition for writ of habeas corpus. He also appeals the district court's denial of a certificate of appealability. The district court determined that Mr. Graves' petition was not timely. We affirm the district court and deny a certificate of appealability.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), establishes a one-year limitations period in which prisoners must file their habeas petitions. *See* 28 U.S.C. § 2244(d)(1). The limitations period triggers when the prisoner's direct appeal becomes final. *See Hoggro v. Boone*, 150 F.3d 1223, 1225 (10th Cir. 1998). For prisoners whose convictions became final before April 24, 1996 – AEDPA's effective date – the limitations period commences on April 24, 1996 and expires one year later, on April 24, 1997. *See id.* at 1225-26. Time spent pursuing state post-conviction relief tolls the one-year grace period. *See* 28 U.S.C. § 2244(d)(2); *Hoggro*, 150 F.3d at 1226.

Mr. Graves was convicted of first-degree murder in Oklahoma state court on September 30, 1987, and sentenced to life imprisonment. The Oklahoma Court of Criminal Appeals denied his direct appeal on September 3, 1992. On August 7, 1997, the Oklahoma Court of Criminal Appeals affirmed the District Court of Oklahoma County which denied Mr. Graves' April 21, 1997 request for post-conviction relief. Mr. Graves filed this petition for habeas relief in the Eastern District of Oklahoma on

September 8, 1997 – 502 days after April 24, 1996. Out of those 502 days, Mr. Graves spent 108 days pursuing state post-conviction relief. Subtracting 108 days from the total elapsed time of 502 days leaves 394 days, an amount in excess of the one-year grace period.

Mr. Graves argues on appeal that: (1) the record establishes a denial of his constitutional rights requiring a certificate of appealability; (2) the doctrine of reasonable opportunity applies; (3) the limitations period runs while a petitioner can seek certiorari review in the United States Supreme court; (4) the limitations period is an affirmative defense limiting the district court to respondents' arguments; (5) the district court erred by not equitably tolling the limitations period; (6) the limitations period does not run while Oklahoma's appellate and post-conviction procedures fail to provide a constitutional means of exhausting state remedies for federal constitutional violations; and (7) the limitations period does not run as to unconstitutional procedures in state court post-conviction proceedings, and the district court must address federal constitutional claims which do not arise in the first instance until state court post-conviction proceedings are concluded.

Mr. Graves' arguments on appeal do not save his petition. The time during which a petition for writ of certiorari is pending in the United States Supreme Court as well as the time during which such a petition can be filed is not within the ambit of § 2244(d)(2) and is not excluded from the one-year limitations period. *See Rhine v. Boone*, 182 F.3d 1153, 1156 (10th Cir. 1999), *petition for cert. filed*, (U.S. Oct. 4, 1999) (No. 99-6598). In addition, Mr. Graves has not presented any compelling reason why

the grace period should be equitably tolled. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990) (describing rare situations in which federal courts have permitted equitable tolling). Nor are we swayed by his related argument that we should apply a reasonable opportunity analysis rather than that set forth in *Hoggro* and other of our decisions.

Mr. Graves also argues that the district court erred by not strictly adhering to respondents' arguments pertaining to the limitations period. We see no significance in the district court's purported deviation. First, respondents did raise the defense of limitations. Second, federal district courts are empowered in habeas cases to consider petitions and dismiss them if "the petitioner is not entitled to relief in the district court." Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 Rule 4; *see also Kiser v. Johnson*, 163 F.3d 326, 328 (5th Cir. 1999) (holding that rule 4 "differentiates habeas cases from other civil cases with respect to *sua sponte* consideration of affirmative defenses")

Mr. Graves' remaining contentions essentially challenge Oklahoma's post-conviction procedures. Mr. Graves contends that AEDPA's one-year limitations period never started to run because he was not afforded a full opportunity to exhaust his federal constitutional claims. Mr Graves claims that the Oklahoma state courts impeded him, within the meaning of § 2244(d)(1)(B), by denying him the opportunity to present evidence in support of his ineffective assistance of counsel claim. In addition, Mr. Graves contends that he was not allowed to develop the necessary factual record under § 2244(d)(1)(D). We do not

find, on the record before us, that the § 2244(d)(1) limitations period "raises serious constitutional questions and possibly renders the habeas remedy inadequate and ineffective." *Miller v. Marr,* 141 F.3d 976, 978 (10th Cir.), *cert. denied,* 119 S. Ct. 210 (1998). Mr. Graves' challenges to Oklahoma's post-conviction procedures do not amount to federal constitutional claims in a federal habeas action. *See Steele v. Young,* 11 F.3d 1518, 1524 (10th Cir. 1993).

Accordingly, we DENY Mr. Graves' request for a certificate of appealability and DISMISS the appeal.

Entered for the Court

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

EDWIN THOMAS GRAVES,	)	
Petitioner,	)	**No. CIV 97-512-S**
v.	)	
BOBBY BOONE, et al.,	)	
Respondents.	)	

ORDER DENYING CERTIFICATE OF APPEALABILITY

(Filed Febr. 11, 1999)

Petitioner has filed a notice of intent to appeal the court's orders entered July 23, 1998, dismissing his petition for a writ of habeas corpus and December 31, 1998, overruling his motion for new trial. After a careful review of the record the court concludes petitioner has failed to make a "substantial showing of the denial of a constitutional right," as required by 28 U.S.C. § 2253(c)(2), as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Publ L. No. 104-132, 110 Stat. 1214 (1996). *See also Lennox v. Evans*, 87 F.3d 431, 434 (10th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 746 (1997), *overruled in part by United States v. Kunzman*, 123 F.3d 1363, 1364 n.2 (10th Cir. 1997).

Accordingly, petitioner is denied a certificate of appealability.

IT IS SO ORDERED this 11th day of February 1999.

/s/ Frank H. Seay
FRANK H. SEAY
UNITED STATES
DISTRICT JUDGE

United States District Court
for the Eastern District of Oklahoma
December 31, 1998

John David Echols, Esq.
P.O. Box 701196
Tulsa, OK 74170

CIVIL MINUTES

6:97-cv-00512

Graves v. Boone

DOCKET ENTRY

MINUTE ORDER: ENTERING ORDER overruling Petitioner's motion for new trial [10-1]. (FHS) (cc: all counsel)

WILLIAM B. GUTHRIE, Clerk

By: Sheila May
Deputy Clerk

THIS NOTICE SENT to THE FOLLOWING COUNSEL:

John David Echols, Esq.
Katharine J. Hodgins, Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

EDWIN THOMAS GRAVES,	)	
Petitioner,	)	**No. CIV 97-512-S**
v.	)	
BOBBY BOONE, Warden, et al.,	)	
Respondents.	)	

ORDER

(Filed July 23, 1998)

This action is before the court on respondent's motion to dismiss petition for failure to file within the limitations period. Petitioner, an inmate in the custody of the Oklahoma Department of Corrections who is incarcerated at Mack Alford Correctional Center in Stringtown, Oklahoma, attacks his conviction in Oklahoma County District Court Case Number CFR-87-1715 for Murder in the First Degree.

Respondent has filed a motion to dismiss, alleging the petition was filed beyond the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996, codified at 28 U.S.C. § 2244(d) ("AEDPA"). The following dates are pertinent to the disposition of the motion:

09/03/92 Petitioner's conviction affirmed by the Oklahoma Court of Criminal Appeals in *Graves v. State*, No. F-89-0303 (Okla. Crim. App. Sept. 3, 1992).

12/02/92 Expiration of the ninety-day period for a certiorari appeal to the United States Supreme Court.

04/21/97 Petitioner filed an application for post-conviction relief in the Oklahoma County District Court.

06/03/97 The district court denied petitioner's application for post-conviction relief in *State v. Graves*, No. 87-1715 (Oklahoma County Dist. Ct. June 4, 1997).

08/07/97 The denial of petitioner's application for post-conviction relief was affirmed in *Graves v. State*, No. PC-97-954 (Okla. Crim. App. Aug. 7, 1997).

09/08/97 Petitioner filed this petition for a writ of habeas corpus.

On April 24, 1996, the President signed the AEDPA into law, amending 28 U.S.C. § 2244 to add a one-year statute of limitation period for filing a writ of habeas corpus by state prisoners:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of reasonable diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

The Tenth Circuit Court of Appeals has since held that a petitioner whose conviction became final on or before April 24, 1996, must file his petition for a writ of habeas corpus before April 24, 1997. *See Miller v. Marr,* 141 F.3d 976 977 (10th Cir. 1998); *see also United States v. Simmonds,* 111 F.3d 737, 746 (10th Cir. 1997).

Acknowledging the *Simmonds* holding, respondent asserts that because his conviction was final in 1992, petitioner's deadline for filing this petition was April 23, 1997. With respect to petitioner's post-conviction proceedings, respondent contends the one-year grace period was for filing a habeas petition, not for pursuing post-conviction remedies.

A plain reading of 28 U.S.C. § 2244(d)(2) shows that the federal courts are required to toll time spent in state

court post-conviction litigation. Applying the statute to petitioner's case, the one-year limitations period began to run on April 24, 1996, the effective date of AEDPA. Petitioner filed this habeas petition on September 8, 1997, 502 days after AEDPA went into effect. However, the 108 days, from April 21, 1997, to August 7, 1997, when petitioner's post-conviction action was pending should be subtracted from the 502 days. The resulting elapsed time of 394 days is [sic] exceeds the one-year limit.

ACCORDINGLY, respondent's motion to dismiss time barred petition is GRANTED, and this action is DISMISSED in its entirety.

IT IS SO ORDERED this 23rd day of July 1998.

/s/ Frank H. Seay
FRANK H. SEAY
UNITED STATES
DISTRICT JUDGE

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

EDWIN THOMAS GRAVES Petitioner, v. THE STATE OF OKLAHOMA Respondent.	)	Case No. PC 97-954

ORDER AFFIRMING DENIAL OF POST-CONVICTION RELIEF

(Filed Aug. 7, 1997)

Petitioner, through counsel, filed an Application for Post-Conviction Relief in the District Court of Oklahoma County, Case No. CRF 87-1715. The Honorable Daniel Owens, District Judge, denied the Application. From the District Court's Post-Conviction Findings, Petitioner appeals.

Petitioner was convicted in Case No. CRF 87-1715 of first degree Murder. On direct appeal, we affirmed his conviction and sentence of life imprisonment. *Graves v. State*, F 89-0303 (Okl.Cr. September 3, 1992) (not for publication). In the Application for Post-Conviction Relief filed in the District Court, Petitioner raised five (5) propositions of error.[1] Judge Owens found that all claims which

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[1] Petitioner alleged five errors of law occurred: separation of jurors during deliberations, lack of instruction on lesser-included offense, lack of instruction on second degree

could have, or should have, been raised on direct appeal were waived, and that all claims which were previously raised were barred by res judicata. Judge Owens examined Petitioner's allegation of ineffective assistance of appellate counsel and determined such a claim was not supported by the law or the record. As set forth in the Post-Conviction Findings, Judge Owens denied post-conviction relief.

On appeal, Petitioner complains that the District Court's decision to deny relief was error. Petitioner argues that he should have been granted an evidentiary hearing to prove his allegations of ineffective assistance of appellate counsel and ineffective assistance of trial counsel. Petitioner also regurgitates the other issues he raised in the District Court and states they each should be considered "to the extent each relates to the Proposition One claim of ineffectiveness of appellate counsel." Petitioner also encourages this Court to "modify its rules and decisions to the extent that it allowed every substantial legal issue not presented on direct appeal to be presented and considered in post-conviction proceedings."

We decline Petitioner's request to modify all of our prior decisions and our rules to allow every substantial legal issue not presented on direct appeal to be presented and considered in post-conviction proceedings. The Post-Conviction Procedure Act, 22 O.S.1991, § 1080 et seq. was not intended to provide a second appeal under the mask of a post-conviction application. *Fox v. State*, 880 P.2d 383,

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manslaughter, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel.

384 (Okl.Cr.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1318, 131 L.Ed.2d 199 (1995). The Act very specifically limits what types of claims may be raised. *See* 22 O.S. 1991, § 1080 *et. seq.*

We will not consider an issue which was raised on direct appeal (and is therefore res judicata) or an issue which could have been raised on direct appeal but was not (and is therefore waived). *See Mayes v. State*, 921 P.2d 367, 370 (Okl.Cr.1996) and citations therein. An exception exists when the court finds a ground for relief asserted which for sufficient reasons was not asserted or was inadequately asserted in a prior application to secure relief. 22 O.S.1991, § 1086.

A sufficient reason for failing to previously raise or for inadequately asserting an issue requires a showing that some impediment external to the defense prevented petitioner and counsel from constructing or raising a claim. *Johnson v. State*, 823 P.2d 370, 373 (Okl.Cr.1991); *see also McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991). As "sufficient reason" for not asserting the claims raised in the application, Petitioner claims his appellate counsel was ineffective for not raising three "fundamental, reversible errors" and for not raising ineffective assistance of trial counsel. Petitioner does not explain how he or his direct appeal counsel was prevented from constructing or raising the claims raised here. Rather, Petitioner argues that examination of the underlying claims would reveal their validity and would require and support a finding of deficient performance of appellate counsel.

The test for determining the effectiveness of both trial and appellate counsel is the standard of "reasonably effective assistance" set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692-693 (1984). *Cartwright v. State*, 708 P.2d 592, 594 (Okl.Cr.1985). In *Lockhart v. Fretwell*, 506 U.S. 364, 369-70, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180, 189 (1993), interpreting *Strickland*, the Supreme Court held:

> [an appellant] alleging prejudice must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Stricland* [sic], 466 U.S. at 687, 104 S.Ct. at 2064; *see also Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed.2d 305 (1986) ("The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); *Nix v. Whiteside*, supra, 475 U.S., at 175 106 S.Ct. at 998. Thus, an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him. *See Cronic, supra*, 466 U.S. at 658, 104 S.Ct. at 2046.

Day v. Hargett, 937 P.2d 502, 503 (Okl.Cr.1997).

The record does not establish that Petitioner's appellate counsel rendered deficient performance sufficient to show the trial was unfair or the verdict suspect. Failure to

raise each and every issue is not determinative of ineffective assistance of counsel and counsel is not required to advance every cause or argument regardless of merit. *See Cartwright v. State*, 708 P.2d 592, 594 (Okl.Cr.1985); *Day v. Hargettt*, 937 P.2d 502, 503 (Okl.Cr.1997)

The record before this court, consisting only of Petitioners assertions that the outcome of the proceedings would have been different, fails to establish that Petitioner was denied effective assistance of appellate counsel. Petitioner also complains that the District Court should have held an evidentiary hearing on the claims of ineffective trial and appellate counsel. However, the District Court was not required to hold an evidentiary hearing on those allegations, because Petitioner had not shown the existence of a genuine issue of material fact which had to be resolved through an evidentiary hearing and was necessary for a determination of the issues raised. 22 O.S.1991, § 1084.

An "appeal to this Court under the Post-Conviction Procedure Act constitutes an appeal from the issues raised, the record, and findings of fact and conclusions of law made in the district court." *Rule 5.2, **Rules of the court of Criminal Appeals,*** 22 O.S.Supp.1996, Ch.18, App. We cannot conclude from the record before us that the trial court erred in denying relief or that Petitioner has shown he is entitled to post-conviction relief.

THEREFORE IT IS THE ORDER OF THIS COURT that the Post-Conviction Findings of the district Court, denying post-conviction relief in Case No. CRF 87-1715, should be **AFFIRMED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 7th day of August, 1997.

/s/ Reta M. Strubhar
RETA M. STRUBHAR,
Vice Presiding Judge

/s/ Gary L. Lumpkin
GARY L. LUMPKIN, Judge

/s/ James F. Lane
JAMES F. LANE, Judge

/s/ Charles A. Johnson
CHARLES A. JOHNSON, Judge

ATTEST:

/s/ James Patterson
Clerk
pa

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

EDWIN THOMAS GRAVES, Petitioner,	)	
-vs-	)	Case No.
THE STATE OF OKLAHOMA, Respondent.	)	CRF-87-1715
	)	(Filed June 04, 1997)

POST CONVICTION FINDINGS

ORIGINAL CHARGE: Murder in the First Degree.

JUDGMENT AND SENTENCE: Life imprisonment.

APPLICATION FOR POST-CONVICTION RELIEF FILED: April 21, 1997.

RESPONSE OF THE DISTRICT ATTORNEY: May 20, 1997.

WAS FORM AUTHORIZED BY COURT OF CRIMINAL APPEALS USED? Yes

PROCEEDING IN COURT OF CRIMINAL APPEALS, IF ANY: Direct Appeal in case number F-89-303.

IS THERE A GENUINE ISSUE OF MATERIAL FACT? No

IS AN EVIDENTIARY HEARING NECESSARY? No

IS THE TESTIMONY OF THE TRIAL JUDGE MATERIAL TO SUCH A HEARING? No

STATEMENT REGARDING MATERIALS REVIEWED FOR DECISION

The Court has reviewed the following materials for the making of its decision:

1. Petitioner's brief and attachments thereto.

2. State's response brief and attachments thereto.

FINDINGS OF FACT

1. On September 23, 1987, Petitioner was convicted by a jury trial before the Honorable Judge Charles Owens. On September 30, 1987, Judge Owens sentenced Petitioner pursuant to the jury's recommendation.

2. Petitioner filed a direct appeal with the Court of Criminal Appeals wherein he raised two propositions of error. They were as follows:

   Proposition I: Evidence at trial was insufficient to support a conviction for First Degree Murder.

   Proposition II: Insufficient evidence existed to find flight.

   The Court affirmed the Petitioner's convictions without modification or reversal.

3. Petitioner filed the instant application wherein he raises five propositions of error. They are as follows:

   Proposition I: Separation of jurors during deliberation.

   Proposition II: No 22 O.S. §837 jury instruction.

   Proposition III: No 22 O.S. §716 jury instruction.

Proposition IV: Ineffectiveness of trial counsel.

Proposition V: Ineffectiveness of appellate counsel.

Petitioner requests that his judgment and sentence be vacated and/or have his case dismissed with prejudice, or be granted a new trial.

CONCLUSIONS OF LAW

1. The post-conviction procedure act is not intended to be a second direct appeal. *Fox v. State*, 880 P.2d 383, 384 (Okl.Cr.1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1318, 131 L.Ed.2d 199 (1995), the Court is not required to consider issues which were raised on direct appeal and barred by *res judicata*. *Thomas v. State*, 888 P.2d 522, 525 (Okl.Cr.1994), *cert. denied*, ___ U.S. ___, 116 S.Ct. 123, 133 L.Ed.2d 73 (1995). Issues which could have been raised on direct appeal, but were not, are waived. *Castro v. State*, 814 P.2d 158, 159 (Okl.Cr.1991), *cert. denied*, 502 U.S. 1063, 112 S.Ct. 947, 117 L.Ed.2d 116 (1992). The issues raised by Petitioner were or could have been raised on direct appeal.

2. Petitioner's claim of ineffective assistance of trial counsel is without merit, and barred by controlling case law. A claim of ineffective assistance of counsel is to be treated the same as any other issue raised on direct appeal, not through collateral attack, or it is waived. *Berget v. State*, 907 P.2d 1078, 1084 (Okl.Cr.App.1995), *cert. denied*, 116 S.Ct. 2504; *Strong v. State*, 902 P.2d 1101, 1103 (Okl.Cr.App.1995). Issues which could have been raised on direct appeal, but were not, are waived. *Castro v. State*, 814 P.2d 158, 159, (Okl.Cr.App.1991) cert. denied, 502 U.S. 1063, 112 S.Ct. 947, 117 L.Ed.2d 116 (1992).

   Petitioner is now precluded from raising this issue for the first time in a Post-Conviction Proceeding. Matters which have or could have been raised on direct

appeal, but were not, will not be considered in Post-Conviction Proceedings. *Nguyen v. State*, 879 P.2d 148 (Ok.Cr.App.1994).

3. The record provided by Petitioner does not support Petitioner's claim that appellate counsel was ineffective. There is nothing in the record to show that appellate counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 674 (1984).

   To meet both the deficient performance and prejudice prongs, the Petitioner must establish that his appellate counsel failed to raise issues warranting reversal, modification of sentence, or remand for resentencing. *Hooks*, 902 P.2d at 1107; *Mann v. State*, 856 P.2d 992, 994 (Okl.Cr.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1869, 128 L.Ed.2d 490 (1994).

   The fact that appellate counsel did not raise every issue now raised by Petitioner is not evidence of ineffectiveness. It is the role of appellate counsel to carefully select and develop the legal issues to be presented to the Court and not raise every non-frivolous issue conceivable. *Jones v. Barnes*, 463 U.S. 745, 749, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

   Further, appellate counsel is not ineffective, and counsel actions do not establish a sufficient reason for a default, the mere fact that counsel fails to recognize either the factual or the legal basis for a constitutional claim, or failed to raise the claim even if recognized. *Webb v. State*, 835 P.2d 115, 116, (Okl.Cr.1992), citing *Murray v. Carrier*, 477 U.S. 478, 486, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986).

ORDER: Application denied.

NOTICE: YOU MAY APPEAL THIS ORDER BY FILING A PETITION IN THE COURT OF CRIMINAL APPEALS WITHIN THIRTY DAYS FROM THIS DATE. (THIS ORDER TO BE FILED BY THE CLERK AS PART OF THE MINUTES IN THIS CASE.)

DATED this 3rd day of June, 1997.

COURT REPORTER PRESENT

/s/ Daniel L. Owens
DISTRICT JUDGE

CLIENT COPY

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

EDWIN THOMAS GRAVES Appellant, -vs- THE STATE OF OKLAHOMA, Appellee.	)	NOT FOR PUBLICATION No. F-89-0303

OPINION

(Filed Sep. 3, 1992)

BRETT, J.:

Appellant, Edwin Thomas Graves, was tried by jury for the crime of Murder in the First Degree, (21 O.S.Supp.1982 § 701.7), in the District Court of Oklahoma County, Case No. CRF-87-1715. The jury returned a verdict of guilty and set punishment at life imprisonment. Appellant was sentenced accordingly. From this judgment and sentence, appellant perfects this appeal.

At trial, testimony was presented that on March 24, 1987, Joyce Graves' body was found in a ditch, underneath a mattress, along the side of County Line Road in Oklahoma City. The body appeared to be nude, hairless[1] and badly beaten with a cut in the back of the head.

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[1] The decedent's hairlessness is due to a thyroid condition and is in no way relevant to her death.

Testimony further established that Joyce was last seen with her husband, appellant, at the Peppermill Club on March 19, 1987. At this time, Joyce appeared to be intoxicated but did not appear to have any physical injuries. During the evening, appellant became angry with Joyce's socializing at the club and the two exchanged words, however, no physical violence took place. The couple was then asked to leave. Shortly thereafter, Joyce left the club. Appellant stayed and finished his shuffle board game then left approximately twenty (20) to thirty (30) minutes after Joyce.

Appellant took the stand and corroborated the above stated facts. He then testified that while driving home from the club he saw Joyce walking past the block in which they lived. He pulled over to the side of the road, picked her up and put her in the backseat of his car. appellant observed that during this time Joyce had lost consciousness but he thought she had passed out from having had too much to drink. When they got home, appellant testified that he attempted to carry Joyce's unconscious body into the house but fell to the ground. Appellant then dragged Joyce into the house, took her clothes off in the living room, and dragged her into the bedroom. He tried to lift her on the bed but could not. At this time, appellant observed that she had a cut [sic] the back of her head but it did not appear to be bleeding. He then left her on the floor to "sleep it off" and went to bed.

Appellant testified that when he woke up the next morning, he saw that the cut on Joyce's head had bled somewhat and there was dried blood in her mouth. He rolled Joyce onto her stomach and attempted artificial respiration. A large amount of blood spilled from Joyce's

mouth. He then felt her pulse and realized she was dead. Appellant testified that in a state of panic, he wrapped Joyce's dead body in a blanket and put her in the trunk of his taxi cab. Appellant put Joyce's wig, clothing, purse and several other belongings into a plastic garbage bag and took them out to the garage. He then tried to clean the blood off the carpet.

Appellant testified that he planned to bury Joyce's body so he bought a pick and shovel. He traveled around town all day but could not find a suitable spot for burial. That evening, he made arrangements to be late in delivering his cab. Finally, after having made arrangements to be late in delivering his cab, appellant left Joyce's body underneath a mattress in a ditch along the side of a road. He then disposed of Joyce's clothes in a nearby dumpster.

Between the period of March 20 and 24, appellant checked on the body daily. On March 23, he informed a friend of Joyce's that Joyce had left him on March 19 in the middle of the night and had stolen three hundred and fifty dollars ($350.00). Appellant further contacted Joyce's daughter in Portland, Oregon telling her that Joyce had left him and he did not know where she was. He told her that he would file a missing person's report and call her back. Appellant never called her back.

While checking the body on March 24, appellant realized that it had been discovered. Appellant immediately contacted Charles Smith and offered to sell his car. Smith accpeted [sic] and gave appellant three hundred dollars ($300.00). Appellant told Smith that his wife had left him and gave Smith the impression that he was going to look for her. Smith testified that appellant

seemed to be in a hurry to leave town. Appellant went straight to the airport from his meeting with Smith, flew to Dallas, bought a bus ticket and traveled around California.

An autopsy on Joyce Graves' body was performed on March 25. Upon an external examination, two lacerations on the head, one which cut down to the skull; a large number of contusions over the face and body, some occurring after death; and an abrasion on the left knee where the skin had been scraped off were found. Internally, bleeding into the skin and tissues of the contusions; a subdural hematoma with actual bleeding into the skull and bleeding into the brain itself and the brain stem were found. The examining pathologist felt that the manner of death was a homicide. In his opinion, Joyce's death resulted from a blunt trauma to the back of the head which caused bleeding directly into the brain. These injuries were consistent with that of being beaten. He testified, however, that the head injuries could have been caused by hitting something while falling. He further testified that several of Joyce's contusions were defense-type injuries but several could have been caused by being carried or dragged.

On March 28, while appellant was away, police obtained a search warrant of the Graves' home. During their search of the bedroom, they discovered a large blood stain on the carpet at the foot of the bed. The stain appeared to have been cleaned but blood residue remained in the carpet fibers. Blood splatters that had not been cleaned were also found on the box spring portion of the bed. The blood was consistent with that of Joyce Graves'.

Appellant called Smith several days after his departure from Oklahoma City. Smith told appellant that Joyce was dead and that appellant was wanted for questioning. Appellant decided to return home. On March 31, he called the police from Texas, informed them that he was coming home and would talk to them by noon the next day. Appellant did as he said and told police the same story he testified to at trial.

We will first address appellant's second assignment of error which states that there is insufficient evidence to show flight, therefore, the flight instruction was not justified. This assignment is addressed first because if the evidence of flight is insufficient, flight can not be considered in determining appellant's first assignment of error. Appellant failed to object to this particular instruction at trial which operates as a waiver of all but fundamental error. ***Long v. State,*** 654 P.2d 647 (Okl.Cr.1982). Determining which instructions are given to the jury is within the discretion of the trial court and we will not interfere with the trial court's decision unless an abuse of discretion is shown. ***Palmer v. State,*** 719 P.2d 1285, 1287 (Okl.Cr.1986). Flight exists when: 1) an accused departs from the scene of a crime; 2) with a consciousness of guilt; 3) in order to avoid arrest for the crime with which he is charged. ***Wilson v. State,*** 250 P.2d 72 (Okl.Cr.1952). When evidence supproting [sic] flight is admitted, the determination of its existence is a question of fact for the jury thus the flight instructions are warranted. ***Id.; McDonald v. State,*** 764 P.2d 202 (Okl.Cr.1988).

Appellant specifically contends that there was insufficient evidence to establish that he left town to avoid arrest. He bases this contention on the fact that appellant

did not leave the country when he was able and voluntarily turned himself over to the police. Although this is true, the record also reveals that on March 24, appellant left town within hours after discovering the police had found his wife's body and admitted to being in a state of panic because of the body's discovery. Given these facts, we find sufficient evidence was presented to support a finding of flight, thus, the trial court did not abuse its discretion in giving the flight instruction.

Appellant's first proposition of error contends that there was insufficient evidence to show the required intent of malice aforethought. Thus, he claims the conviction for First Degree Murder should be reversed. "Malice is that deliberate intention unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof." 21 O.S.Supp.1985 § 701.7; ***Short v. State,*** 634 P.2d 755 (Okl.Cr.1981). To determine if malice was manifested by external circumstances, we must look to the totality of the circumstances. ***See Short v. State,*** 634 P.2d 755 (Okl.Cr.1981). Malice can be proven solely by circumstantial evidence and is within the province of the jury to decide its existence. ***Cavazos v. State,*** 779 P.2d 987 (Okl.Cr.1989); ***Barr v. State,*** 763 P.2d 1184 (Okl.Cr.1988). Furthermore, certain actions by appellant such as flight and attempts to destroy evidence are admissible to show a consciousness of guilt. ***See Wills v. State,*** 636 P.2d 372 (Okl.Cr.1981); ***Wilson v. State,*** 250 P.2d 72 (Okl.Cr.1952).

Evidence at trial established the following: First, Joyce had expressed a fear of appellant on the night of her disappearance. Second, appellant was angry with

Joyce right before her disappearance. Third, the pathologist thought the death was a homicide because Joyce's injuries were consistent with that of being beaten. Fourth, appellant was with Joyce at the time of her death, he hid the body in a ditch along a country road so that it would not be found and checked on it daily to make sure it was covered. He further covered his tracks by attempting to clean Joyce's blood off the carpet, destroying her clothes, lying about her where abouts [sic], and leaving town when he realized the body had been discovered. This evidence along with the photographs of Joyce's dead body, when looked at in the light most favorable to the State, is sufficient for a jury to conclude beyond a reasonable doubt that appellant intentionally and deliberately murdered his wife. ***See Spuehler v. State,*** 709 P.2d 202 (Okl.Cr.1985).

In light of the foregoing reasons, appellant's Judgment and Sentence is **AFFIRMED.**

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY BEFORE THE HONORABLE CHARLES OWENS, DISTRICT JUDGE

Appellant, EDWIN THOMAS GRAVES, was convicted of Murder in the First Degree in the District Court of Oklahoma County, Case No. CRF-87-1715, before Judge Charles L. Owens, District Judge. Appellant was

sentenced to life imprisonment. From this judgment and sentence, appellant perfected this appeal. **AFFIRMED.**

DAN CONNALLY
ASSISTANT APPELLATE PUBLIC DEFENDER
1660 CROSS CENTER DRIVE
NORMAN, OKLAHOMA 73019
ATTORNEY FOR APPELLANT

SUSAN BRIMER LOVING
ATTORNEY GENERAL OF OKLAHOMA
SID BROWN
ASSISTANT ATTORNEY GENERAL
112 STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73102
ATTORNEYS FOR APPELLEE

OPINION BY: BRETT, J.
LANE, P.J.: CONCUR
LUMPKIN, V.P.J.: CONCUR
PARKS, J.: CONCUR
JOHNSON, J.: CONCUR

THE STATE OF OKLAHOMA)
) SS.
OKLAHOMA COUNTY)

In the District Court of the Seventh Judicial District of the State of Oklahoma, sitting in and for Oklahoma County, Oklahoma

THE STATE OF OKLAHOMA,)
Plaintiff,)
) No. CRF-87-1715
-vs-)
EDWIN THOMAS GRAVES,)
DOB: 07-31-38)
Defendant.)

JUDGMENT AND SENTENCE ON CONVICTION

(Filed Oct. 8, 1987)

Now, on this 30th day of SEPTEMBER, 1987, the same being a juridical day of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant EDWIN THOMAS GRAVES being personally present in open court, and being duly represented at all appearances before the court by his attorney of record/CHRIS BOX, and having been legally charged with the offense of MURDER IN THE FIRST DEGREE and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly pleaded not guilty to said offense after having been duly advised of his rights; and having been duly and legally tried and convicted of the crime of MURDER IN THE

FIRST DEGREE, and the defendant having been asked by the court whether _____ he has any legal cause to show why judgment and sentence should not be pronounced against him, and ___ he stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the court that said defendant is guilty of the crime of MURDER IN THE FIRST DEGREE

It is Therefore, Ordered, Adjudged and Decreed by the Court that EDWIN THOMAS GRAVES is sentenced to a term of LIFE IMPRISONMENT under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Oklahoma State Penitentiary at McAlester, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of MURDER IN THE FIRST DEGREE said term of sentence to begin at and from the delivery of the defendant to the Warden of the State Penitentiary at McAlester, Oklahoma; and that said defendant pay the cost of this prosecution, taxed at $84.00, for which judgment is hereby rendered against the defendant; and thereupon the defendant is by the court notified of his right of appeal.

It Is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said State Penitentiary at McAlester, Oklahoma, and that the Warden of said penitentiary detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma,

two copies of this judgment, sentence and order, one of the copies to accompany the body of the said defendant to said penitentiary at McAlester, Oklahoma, and to be left therewith at the said penitentiary, said copy to be warrant and authority for the Imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma County, Oklahoma, for the transportation and imprisonment of the said defendant as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

(Seal)
(COURT COST AND VICTIM COMPENSATION FUND IN THE AMOUNT OF $20.00 TO BE PAID WITHIN 6 MONTHS AFTER RELEASE.)

/s/ Charles L. Owens
CHARLES L. OWENS,
District Judge

Attest:

TOM PETUSKEY, COURT CLERK
TOM PETUSKEY, COURT CLERK

By /s/ Illegible, Deputy Court Clerk

ORIGINAL